

IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS  
99-210V  
December 13, 2006  
Not for Publication

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SCOTT PEARL,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

Respondent.

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Hepatitis B vaccine; causation  
in fact; decision on the record,  
IDDM

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Clifford Shoemaker, Esq., Shoemaker & Associates, Vienna, VA, for petitioner.  
Althea Davis, Esq., U.S. Department of Justice, Washington DC, for respondent.

**VOWELL, Special Master**

**DECISION**<sup>1</sup>

On April 7, 1999, Mr. Scott Pearl timely filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*<sup>2</sup> [the “Vaccine Act” or “Program”] alleging that the hepatitis B vaccinations he received on June 15, 1992, July 30, 1992, and July 20, 1993 caused “adverse reactions.”<sup>3</sup> Petition,

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

<sup>2</sup> Hereinafter, for ease of citation, all “§” references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

<sup>3</sup> The medical records show that petitioner actually received his first hepatitis B vaccination on June 16, 1992. See Petitioner’s Exhibit 3, p. 16.

¶ 2.<sup>4</sup> Shortly thereafter, petitioner requested a stay of the proceedings to obtain medical records and affidavits, as none of the statutorily required supporting documentation accompanied the petition.<sup>5</sup> On April 9, 1999, petitioner was ordered to file all outstanding medical records and an expert opinion by July 16, 1999 or to file a status report regarding his progress in complying with that order. On May 14, 1999, petitioner again requested that the proceedings be stayed. The motion was denied. Order, dated May 19, 1999. On July 13, 1999, petitioner filed a status report indicating that his counsel was “still in the process of collecting medical records for filing.”

The case was reassigned on August 3, 1999, as part of the consolidation of cases alleging injury from hepatitis B vaccines. Proceedings were suspended for 180 days in this and numerous other hepatitis B cases. A status conference was held on January 21, 2000, to discuss petitioner’s motion to designate a master file for all such cases filed by petitioner’s counsel of record. That motion was denied in a February 14, 2000 order. Petitioner filed status reports on February 15, May 16, August 21, and December 12, 2000; and on March 13, 2001, but filed no medical records or other exhibits.

On August 8, 2001, petitioner was granted the authority to issue subpoenas. That same month, noting that no medical records had been filed in the two and one third years since the petition had been filed, the special master assigned to this case ordered petitioner to file a single medical record by January 18, 2002 or risk dismissal of the case for failure to prosecute. Order, dated August 23, 2001. Three exhibits containing medical records were filed on December 19, 2001.

After review of Petitioner’s Exhibits 1-3, respondent filed a status report requesting that the petition be amended to allege a specific injury; that petitioner file an affidavit describing the circumstances surrounding his vaccinations and a statement of his current condition; that petitioner file an immunization record and records of medical treatment; and that petitioner file an expert report supporting his claim. Respondent’s Status Report, dated January 19, 2002. Petitioner thereafter requested that all action on this case be stayed, and on February 24, 2003, his request was granted.

The case remained stayed until it was reassigned to me in February 2006. On March 27, 2006, I held a recorded joint status conference in numerous cases involving the hepatitis B vaccine, including this one. At that status conference, petitioner’s counsel represented that he was having difficulty locating either petitioner or other

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<sup>4</sup> The petition contains two paragraphs numbered “2”. This statement appears in the second of those two numbered paragraphs.

<sup>5</sup> Section 300aa–11(c) of the Vaccine Act requires the petition to be accompanied by certain documentary evidence, including records pertaining to the vaccination and subsequent treatment. See also, Vaccine Rule 2(e), RCFC, Appendix B.

family members.<sup>6</sup> He indicated that he wished to transfer this case to another attorney, but would not be able to do so until he located his client. I vacated all previously granted stays and ordered counsel to file a status report by May 26, 2006, indicating either that he had located his client or detailing the efforts he had made to do so. See Order, dated April 3, 2006.

In an order dated June 22, 2006, I summarized the events that transpired in this case after the March 2006 status conference: Petitioner's counsel filed his status report one day late, requesting additional time to locate his client. The status report was not responsive to my order of April 3, 2006, in that it failed to detail the steps counsel had taken to locate his client. Being disinclined to grant petitioner's counsel's request for additional time without further explanation, I held another recorded status conference on June 9, 2006. Based on the representations made at that status conference, I ordered petitioner's counsel to file a status report by July 26, 2006 indicating what specific efforts he had made to locate his client. I further indicated that I would entertain a request from either party to rule on the record, should counsel be unable to contact his client by that date. I reminded counsel that late responses to court orders were not acceptable and that requests for extensions of time must be timely filed and contain an explication of counsel's efforts to comply with the deadline.

On July 31, 2006, petitioner's counsel once again filed an untimely request for an enlargement of time. He requested an additional 60 days to locate his client, detailing his previous efforts to locate him. See Motion for Enlargement of Time, dated July 31, 2006. On August 8, 2006, I ordered petitioner to show cause by September 6, 2006 why this case should not be dismissed for failure to prosecute. In that order, I noted that the July status report was duplicative of the information adduced at the June 9, 2006 status conference regarding efforts to locate Mr. Pearl or his father.

On September 6, 2006, petitioner's counsel filed a response to the show cause order indicating that he had contacted his client and that he no longer desired to pursue his claim. Counsel requested an additional 30 days to file a statement to that effect and a Motion for Judgment on the Record. I granted that request, giving petitioner until October 13, 2006 to file a motion for judgment on the record. Order, dated September 15, 2006.

On October 12, 2006, petitioner's counsel requested an additional 30 days to obtain authorization from his client to file a motion for judgment on the record. In view of the repeated requests for enlargements of time in this case, I conducted a status conference to ascertain the problem in obtaining Scott Pearl's authorization. At the status conference, I noted that the last substantive filings in this case were made in December 2001. While the case was stayed for a substantial period of time, the stays

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<sup>6</sup> Petitioner's father had filed a claim on behalf of his minor daughter (this petitioner's sister) at the same time petitioner filed his claim.

were lifted in March 2006. In the intervening seven months, counsel managed to locate his client, but Mr. Pearl was not responsive to the court's deadline for filing his motion for judgment on the record. I therefore denied the motion for enlargement and indicated my intention to rule on the record, although a dismissal for failure to comply with court orders would be warranted by this record.<sup>7</sup> See Order, dated October 23, 2006. There have been no further filings in this case.

In order to prevail under the Program, petitioner must prove either a "Table" injury<sup>8</sup> or that a vaccine listed on the Table was the cause in fact of an injury. Petitioner did not suffer a "Table" injury. While Petitioner's Exhibit ["Pet. Ex."] 3, pp. 13, 16-18, establishes that he received the three hepatitis B vaccinations alleged in the petition, no evidence submitted links his vaccinations to any illness, disability, injury, or condition. See § 300aa-11(c)(1)(C)(i).

### **I. Medical History**

Mr. Scott was born by caesarean section June 3, 1980. Pet. Ex. 2, p. 24. His pediatric records do not reflect any problems other than the occasional upper respiratory and ear infections and rashes common to most children. Pet. Ex. 2, pp. 4-21. There is a gap in the pediatric records from May 1990 through February 1997, although it appears he was seen at the same medical practice in 1997 as he had been in 1990. *Compare* Pet. Ex. 2, p. 3 *with* p. 5 (same patient number appears in the upper right hand corner of both exhibits). He received his first two hepatitis B vaccinations on June 16 and July 30, 1992. Pet. Ex. 3, pp. 16-17.

Mr. Scott, then age 12, was admitted to Memorial Hospital in Hollywood, FL, on April 13, 1993, where he was diagnosed with insulin dependent diabetes mellitus ["IDDM"]. Pet. Ex. 1, p. 69. His symptoms prior to admission included a history of excessive thirst and polyuria for approximately 10 days. Two weeks prior to this admission, he had the flu, during which he had a fever of 102 to 103 degrees. His prior health was described as "excellent." *Id.*, pp. 72-73. He received his third hepatitis B vaccination several months after this diagnosis of IDDM. Pet. Ex. 3, p. 19.

A year later, Mr. Scott was again hospitalized, this time for placement of an insulin pump to provide greater insulin control. Pet. Ex. 1, p. 13. No further medical

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<sup>7</sup> See *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996) (upholding dismissal of a petition for compensation for failure to comply with court order and failure to substantiate the claim); and *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), *aff'd*, 991 F.2d 810 (Fed. Cir. 1993) (dismissal for failure to prosecute and for ignoring court orders to substantiate the petition).

<sup>8</sup> A "Table" injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified. The hepatitis B vaccine is listed on the Table; however petitioner's medical condition is not an injury specified for compensation for that vaccine.

records were submitted. None of the records link the development of his IDDM to the two hepatitis B vaccinations he received nine and ten months prior to his diagnosis.

## II. Discussion

The Vaccine Act provides that a special master may not make a finding awarding compensation based on the claims of a petitioner alone, unsubstantiated by medical records or medical opinion. See § 300aa-13(a)(1). Petitioner has failed to proffer medical records or an expert opinion causally linking his medical condition to his vaccinations.

To satisfy his burden of proving causation in fact, petitioner must “show by preponderant evidence that the vaccination brought about [his] injury by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.” *Althen v. Sec’y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005). See also *Hines v. Sec’y, HHS*, 940 F.2d 1518, 1525 (Fed. Cir. 1991). He must show “that the vaccination was the reason for the injury. A medical or scientific explanation must support this logical sequence of cause and effect.” *Grant v. Sec’y, HHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992). Circumstantial evidence and medical opinions may be sufficient to satisfy the second *Althen* factor. *Capizzano v. Sec’y, HHS*, 440 F.3d 1317, 1325 (Fed. Cir. 2006). Without more, “evidence showing an absence of other causes does not meet petitioner’s affirmative duty to show actual or legal causation.” *Grant*, 956 F.2d at 1149. Mere temporal association is not sufficient to prove causation in fact. *Hasler v. U.S.*, 718 F.2d 202, 205 (6<sup>th</sup> Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).

While it is clear that petitioner developed IDDM, there is no evidence to indicate that the hepatitis B vaccinations were the cause of that disease. Mr. Scott received two hepatitis B vaccinations nine and ten months before onset of his IDDM. The third vaccination was administered three months after the diagnosis, and there is nothing in the record that indicates it had any effect on his diabetic condition. There is no evidence in this record that the first two vaccinations are causally connected to Mr. Scott’s IDDM.

While close calls regarding causation should be resolved in favor of the petitioner, *Althen*, 418 F.3d at 1280, in this case, petitioner has completely failed to meet his burden to establish vaccination causation for his injury.

### **III. CONCLUSION**

A special master can only authorize compensation when a medical condition either falls within one of the “Table Case” categories or when some evidence, such as a competent medical opinion, causally connects the vaccine with the injury. No such proof exists in the record before me. Therefore, the petition for compensation is DENIED. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance with this decision.<sup>9</sup>

**IT IS SO ORDERED.**

December 13, 2006

\_\_\_\_\_ Date

s/Denise K. Vowell

**Denise K. Vowell**

Special Master

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<sup>9</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party’s filing a notice renouncing the right to seek review.